Date: August 27, 1997

Case No.: 95-INA-292

In the Matter of:

MARK VISHNEPOLSKI,
Employer

On Behalf Of:

SERGUEI KARASSEV,
Alien

Appearance: Paul W. Janaszek
For the Employer/Alien

Before: Huddleston, Neusner, and Rosenzweig
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 25, 1994, Mark Vishnepolski ("Employer") filed an application for labor certification to enable Serguei Karassev ("Alien") to fill the position of Cook Kosher (AF 3-4). The job duties for the position are:

> Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are eight years of grade school, four years of high school, and two years of experience in the job offered.

The CO issued a Notice of Findings on September 12, 1994 (AF 24-27), proposing to deny certification on the grounds that the duties for the job offer do not appear to constitute full-time employment in the context of the Employer's household in violation of § 656.50 (now recodified as § 656.3). The CO instructed the Employer that he could rebut this finding by amending the job duties or by submitting evidence that the job constitutes full-time employment customarily required by the Employer. Additionally, the CO requested that the Employer provide evidence and documentation to support: (1) the kosher food experience requirement; (2) that a relative is currently performing these duties; and, (3) that an hourly worker performs the cleaning duties. Lastly, the CO noted that the ETA 750B form did not list the Alien's work history for the last three years, and requested that the Employer provide this information.

Accordingly, the Employer was notified that it had until October 17, 1994, to rebut the findings or to cure the defects noted.

In his rebuttal, submitted under cover letter dated October 13, 1994 (AF 28-33), the Employer contended that, "[i]t has always been clearly stated that the position of Cook, Live-Out carries out a permanent nature of employment by itself, requiring 40 hours of cooking for the household and carrying out related food preparation duties weekly." The Employer listed the Cook's duties, which consist of 45 meals per week for himself, his 14-year-old son, and his 70-year-old mother-in-law; and two meals and two snacks per day for his wife. The Employer also contended that he has never employed a full-time Cook in his household before because his

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

mother-in-law performed these duties previously; however, due to her advanced age and health conditions, plus the responsibilities dealing with the child care of his son, she is no longer able to perform the cooking duties. The Employer included weekly schedules for himself, his wife, and his son. He also stated that the household cleaning duties are performed by his wife, and child care duties are performed by his mother-in-law.

The CO issued the Final Determination on October 18, 1994 (AF 34-36), denying certification because the Employer's rebuttal failed to establish the full-time nature of this job offer and failed to establish it as a customary requirement. The CO found the Employer's allotment of 2½ hours per day for the Cook to shop and put food away to be unrealistic and excessive. Additionally, the CO found the Employer's allowance of one hour preparing lunch for two, followed by three hours preparing and cleaning up for a dinner meal which the Cook does not serve, to be unrealistic and excessive. The CO stated that, "[i]t would appear, rather, that an effort is being made to qualify the alien under the 'Skilled Worker' category because of the unavailability of visa numbers in the 'Other Worker' category of employment based preferences."

On November 10, 1994, the Employer requested review of the Denial of Labor Certification (AF 37-48). On February 3, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

We are concerned that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive, which does not appear to have been considered by the CO. The job requirements include two years of experience in the job duties of Kosher cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Kosher cooking.

Further, we are concerned that the CO's finding regarding the existence of an offer of full-time employment has confused the issue of business necessity (within the context of an unduly restrictive job requirement) with whether the offer of employment is for 40 hours per week of employment.

For these reasons, we cannot conclude that the CO's determination is reasonable or supported by sufficient evidence in the record as a whole. Therefore, this matter will be remanded with instructions to the CO to consider whether the Employer's requirement of two years of experience in cooking Kosher foods is unduly restrictive, thus requiring a showing of business necessity in accordance with 20 C.F.R. § 656.21(b)(2)(i)(B), which provides that the job opportunity's requirements, unless adequately documented as arising from business necessity, shall be those normally required for the job in the United States as defined in the *Dictionary of*

Occupational Titles (DOT). On Remand, the CO is also permitted to develop additional evidence if it is believed that full-time employment is not being offered.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further action in accordance with this decision.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.